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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1350

UNITED TRANSPORTATION UNION,
Petitioner,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

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ILLINOIS CENTRAL RAILROAD COMPANY,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

Petitioner, United Transportation Union, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 30, 1970 (Appendix A, A-6), rehearing denied November 18, 1970 (Appendix A, A-7).

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix A), is reported at 433 F. 2d 566. The Memorandum Opinions and Orders of the District Court for the Eastern District of Illinois (Appendix B), are unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered October 30, 1970 (Appendix A, A-6). A Petition for Rehearing was denied on November 18, 1970, and the issuance of the mandate of the Court of Appeals was stayed, on December 3, 1970, until February 16, 1971 (Appendix A, A-7, 8), Jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether a district court decision denying enforcement of a National Railroad Adjustment Board Award and remanding the dispute to the Board for further proceedings, without the court retaining any jurisdiction, is a final decision subject to appeal under 28 U. S. C., § 1291.

2. Whether a district court decision purporting to be non-final (by reason of a remand to the National Railroad Adjustment Board, although no jurisdiction is retained in the court) is immune from appellate review, as a matter of right, of the jurisdiction of the district court to enter such an order.

STATUTES INVOLVED

The provisions of Sections 3, First (p) and (q) of the Railway Labor Act (45 U. S. C. 153, First (p), (q)), and of 28 U. S. C. 1291, are set forth in Appendix D, A-21, 25-27.

STATEMENT

This is an action by Petitioner, United Transportation Union, hereinafter "UTU" or the "Union," successor to the Brotherhood of Railroad Trainmen, as representative under the Railway Labor Act, hereinafter "RLA," of employees of Respondent, Illinois Central Railroad Company,

hereinafter "I.C." or the "railroad," in train and yard service and thus of J. W. Stuard, under the provisions of subsection (p) of Section 3, First of the RLA, 45 U. S. C. 153 First (p) (1970 Supp.), to enforce an order, made January 30, 1968, by the National Railroad Adjustment Board, First Division, hereinafter "NRAB," requiring the I.C. to make effective, on or before February 29, 1968, an award of the NRAB, made January 30, 1968, sustaining the claim of J. W. Stuard for reinstatement to employment by the I.C. as a yardman and yard foreman with seniority unimpaired and pay for all time lost on August 4, 1961 and thereafter until reinstated (Appendix C, A-14).

For many years prior to August 4, 1961 and since that time, the collective agreement between the union and the I.C. provided that yardmen taken out of service by the railroad shall be notified of the reason therefor, that the I.C. conduct an evidentiary investigation thereof in which the employee should have the right to a representative and to participate by presenting evidence and questioning witnesses and to appeal to higher officers of the railroad from an unsatisfactory decision and that, in case the dismissal of an employee "is found to be unjust" such employee "shall be reinstated and paid for all time lost."

On August 4, 1961, J. W. Stuard was removed from service by an I. C. trainmaster for allegedly having used an intoxicant while on duty in violation of the railroad's Rule "G" and, on August 7, 1961, the I. C., in pursuance of the collective agreement, notified Stuard in writing that it would, on August 9, 1961, conduct an investigation to determine whether Stuard had used, or was under the influence of, an intoxicant while working as an engine foreman on August 4, 1961 and that his prior work record would be reviewed at such investigation.

On August 11, 1961, the I. C. notified Stuard by letter that the facts developed at the investigation were that he violated Rule "G" in that he used an intoxicant while

on duly on August 4, 1961, that for his violation he was dismissed from the service and that the measure of discipline assessed him was determined in part by his past record.

Thereafter, Stuard submitted to the I. C. a claim for reinstatement with seniority rights unimpaired and pay for all time lost on August 4, 1961 and subsequent dates until reinstated, on the ground that he had been unjustly removed from service on August 4, 1961 and dismissed on August 11, 1961, which claim was finally disallowed on April 9, 1962, by the I. C.'s manager of personnel.

Both parties made written submissions to the NRAB which included a copy of the railroad's investigation. After consideration of the case the Board deadlocked with respect to the case. The National Mediation Board appointed a referee to sit with the NRAB to resolve Stuard's case and sixty other deadlocked cases. The NRAB, with the appointed referee, made the award and order in question in this case (Appendix C, A-17 to A-20).

The award sustained the claim of Stuard for reinstatement with seniority rights unimpaired and pay for all time lost on August 4, 1961 and all subsequent dates until reinstated.

The Board noted Stuard's denial of the charge and that his denial was corroborated by three witnesses and found that the Illinois Central had denied Stuard a fair and impartial investigation because, instead of calling the witnesses who gave statements in support of the charge that Stuard had violated Rule "G" and, by direct questions, eliciting statements within their personal knowledge with respect to which the witness would have been subject to cross-examination and impeachment if their answers varied from those contained in prior written statements of the witnesses, the I. C.'s investigating officer read into evidence prior written reports by Engineer Trafford, Fire-

man Cowan, Trainmaster Corzine and Special Agent Lynn which, *per se*, were hearsay and also contained hearsay consisting of statements by others than the person making the report, and assertions and conclusions not within the personal knowledge of the witness; the I. C.'s investigating officer asked questions which necessarily called for and allowed witnesses to state prejudicial hearsay and conclusions; the I. C. had not made any effort to confirm the inference from the statements of Engineer Trafford and Fireman Cowan that it was a bottle of wine or beer that had been thrown from the caboose at the Norris Grain Elevator switch and should not have permitted evidence giving rise to such inference if it knew it would not be able to support the inference; the investigating officer, without theretofore having made an independent determination that Stuard had violated Rule "G" as alleged and limiting the use of Stuard's prior record to determine the quantum of discipline to be assessed, read into the record of the investigation, numerous letters of other employees, newspaper articles, police reports, uncorroborated reports and discipline assessed Stuard, without questioning Stuard with respect thereto and then using such letters, newspaper clippings, etc., as a basis for cross-examination of Stuard if, in answer to questions with respect thereto Stuard made contrary statements and that the evidence of the I. C. in support of its position was almost totally hearsay and hence inadmissible.

The I. C. refused to comply with the award and order of the NRAB and on April 26, 1968, the union commenced this action under Section 3, First (p) of the RLA, 45 U. S. C., § 153, First (p) (1970 Supp.) to enforce the award and order of the NRAB.

The railroad, by its answer sought a judgment under subsection (p) of the RLA, setting aside the award and order of the Board and dismissing the complaint on the ground the NRAB in making the award and order failed

to comply with the requirements of the RLA, had failed to conform or confine itself to matters within the scope of its jurisdiction and that the award was actually and undisputedly without foundation in reason and fact as it alleged was shown by the transcript of the investigation conducted by the railroad of its charge against Stuard which had been submitted to the NRAB with the written submissions of the union and railroad to the Board. The railroad attached to its answer a copy of the transcript of its investigation and of the written submissions of parties which had been filed with the NRAB.

The NRAB never was requested and did not file in the district court "the record of the proceedings on which it based its action" as would have been required if the railroad had sought a judgment setting aside the award and order of the Board under subsection (q) of the Act.

The union filed an affidavit of its representative on the NRAB detailing the procedure of the Board and its handling of Stuard's case.

The decision of the district court was based upon motions for summary judgment, one filed by the union and the other by the railroad, each of which stated no genuine issue as to any material fact existed.

The union's motion was for a partial summary judgment requiring the railroad to reinstate Stuard to employment with seniority unimpaired as required by the award and order of the Board and to reserve jurisdiction to determine the amount payable to Stuard, since the determination was, under the award and order, dependent upon when Stuard should be reinstated to employment by the railroad.

The railroad's motion was for a judgment that the award was null and void and for dismissal of the complaint and was based in part on an affidavit of Walter J. Cassin which was attached to the motion and which stated in substance that the railroad's procedure for adducing its evidence in

its investigation of its charge against Stuard did not differ in any material respect from the procedure which the railroad had followed for many years to which, theretofore, the union had not objected, either during an investigation or before the NRAB as a ground for setting aside a decision by a railroad to discharge an employee. A-36.

The complete decision of the district court was in two orders, one filed April 9, 1969 and the other on July 10, 1969. Appendix B.

The district court's order filed April 9, 1969, denied the union's motion for partial summary judgment enforcing the award and order of the NRAB because:

> "According to the various pleadings and briefs, it appears that the decision of the Referee of NRAB was founded, at least in part, on his rejection of testimony presented against the claimant. The reason for rejection is that said testimony and letters were read into the record and these letters were based on hearsay. In reaching this conclusion, the Referee stated '* * * the evidence used to support the position of the carrier is almost totally hearsay and hence inadmissible.' The briefs and affidavits show that in hearings conducted by NRAB similar evidence is almost invariably considered in comparable situations when presented in the manner in which the evidence was here presented.
>
> "The Court finds that the Referee failed to follow the established procedures for conducting hearings before NRAB, which have been almost universally followed in the First Division. . . ." A-9, 10.

and upon the same ground the district court, *sua sponte,* remanded the matter to the NRAB

> ". . . for further consideration on the merits in keeping with the procedures established by the National Railroad Adjustment Board in the First Di-

vision—the Board to specifically consider all the evidence presented in its entirety in keeping with the established procedures." A-10.

The district court also denied the railroad's motion.

On April 18, 1969, the union filed a motion to vacate the order entered April 9, 1969, and to sustain the union's motion for partial summary judgment on the ground there had been no showing by defendant nor finding by the court that the NRAB had violated a requirement of the RLA nor that the award and order of the Board did not conform nor confine itself to matters within the scope of the jurisdiction of the Board but was based upon a requirement established by the court which was not included in the RLA (A-11, 12). The district court denied the union's motion on July 10, 1969, stating:

> "Although not previously stated in hard language, the court now states that the action before the Board amounted to a failure of the Division to comply with the requirements of the Railway Labor Act and for that reason the matter was remanded for further consideration to permit the Board to correct the deficiency noted" (A-13).

The union filed its Notice of Appeal on August 5, 1969, stating that it:

> ". . . hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order and judgment entered April 9, 1969, denying the motion of plaintiff, Brotherhood of Railroad Trainmen for partial summary judgment and remanding the matter to the National Railroad Adjustment Board, First Division, and from the order of this Court entered July 10, 1969, denying plaintiff's motion to vacate the order and judgment entered April 9, 1969" (A-13).

On October 30, 1970, the court below dismissed the union's appeal on the ground the judgment of the district court remanding the dispute to the NRAB was not a final decision of which it had jurisdiction under 28 U. S. C. 1291 (A-3), and denied the union's petition for rehearing on November 18, 1970 (A-7).

REASONS FOR GRANTING THE WRIT

THIS CASE INVOLVES IMPORTANT QUESTIONS ARISING UNDER THE RAILWAY LABOR ACT WHICH SHOULD BE, BUT HAVE NOT BEEN, SETTLED BY THIS COURT AND THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH AND FAILS TO GIVE EFFECT TO CONTROLLING DECISIONS OF THIS COURT AND TO THE INTENT OF CONGRESS IN AMENDING SECTION 3 OF THE RAILWAY LABOR ACT IN 1966 BY PUBLIC LAW 89-456 AND TO THE EXPRESS PROVISIONS OF THAT ACT.

PRELIMINARY STATEMENT

Petitioner is mindful that one of the questions presented in this case—whether a decision by a district court remanding to the NRAB for further arbitration the merits of a dispute with respect to which the NRAB theretofore had made an award is subject to appellate review—was presented by the petition for a writ of certiorari in *Transportation-Communication Division, Brotherhood of Railway, Airline & Steamship Clerks, etc. v. St. Louis-San Francisco R. Co.*, No. 155, October Term, 1970, which was denied by this Court on October 12, 1970, ... U. S. ..., 91 S. Ct. 34. In that case, the disputes with respect to which the awards in question were made had been settled while the case was pending in the Court of Appeals and were moot at the time the court filed its opinion as appears from pages 5-6 of the petition for a writ of certiorari

which was filed in this Court and from the opinion of the Court of Appeals for the Eighth Circuit in the case, *sub nom, Transportation-Communication Employees' Union v. St. Louis-San Francisco R. Co.*, 419 F. 2d 933. Hereinafter, that case will be referred to as the "Frisco" case.

The underlying dispute with respect to which the NRAB made the award and order in question in this case is not moot but is alive and unresolved. The employee J. W. Stuard, who was discharged by the railroad in 1961 continues to be deprived of employment by the railroad and of what he could have earned in such employment, notwithstanding the award of the NRAB that he was wrongfully discharged, should be reinstated to employment by the railroad and paid for such lost earnings, the enforcement of which the union seeks in this case.

Under the decision of the district court and the court below, unless changed in pursuance of a decision of this Court, whether the railroad must ever reinstate the employee and pay him for the earnings he has lost since he was discharged, as required by the award and order of the NRAB, will depend upon the result of a reconsideration by the NRAB of the employee's claim and the nature of another award by the Board, irrespective of whether, upon a consideration of the merits of the decision of the district court, it might be found that the award and order of the NRAB should have been enforced.

I. The Court Below Had Jurisdiction of and Should Have Decided the Union's Appeal From the Decision of the District Court Denying Enforcement of the Award and Order of the National Railroad Adjustment Board.

The court below erroneously considered that the union appealed *only* from the district court's remand order, although noting that the district court had denied the union's motion for partial summary judgment to enforce

that part of the award and order of the NRAB requiring the railroad to reinstate Stuard to employment which was a condition precedent to enforcement of the remainder of the award and order of the NRAB requiring the railroad to pay Stuard for all time lost from August 4, 1961, ***until reinstated.*** A-2, 3, 433 F. 2d at 567-8.

As heretofore shown in the *Statement,* the union did appeal from the decision of the district court denying enforcement of the award and order of the NRAB and the merits of that decision were submitted to the court below by the parties in their respective briefs (Appendix E, A-33, 34, containing excerpts from Plaintiff-Appellant union's Brief in the court below).

The omission of the court below to consider the merits of the union's appeal from the judgment of the district court denying enforcement of the award and order of the NRAB was called to the attention of the court and specifically requested by the union in its petition for rehearing in which it was stated: "Wherefore, UTU respectfully prays the Court to set aside its decision denying the appeal and to consider it upon the merits of the judgment of the District Court denying enforcement of the award . . . and to remand the cause to the District Court with directions to enforce the award in accordance with the Union's motion for partial summary judgment" (Appendix E, A-25, containing excerpts from the union's petition for rehearing in the court below).

Decisions of district courts denying enforcement of awards of the NRAB have been subject to appellate review since the amendment of the Railway Labor Act in 1934.

As appears from the opinions in *Washington Terminal Co. v. Boswell,* 124 F. 2d 235 (D. C. Cir. 1941), *aff'd by an equally divided court,* 319 U. S. 732 (1943); *Elgin, Joliet & Eastern R. Co. v. Burley,* 325 U. S. 711, 721-728 (1945); *Brotherhood of Railroad Trainmen v. Chicago*

River & Indiana R. Co., 353 U. S. 30 (1957) and *Pennsylvania Railroad Co. v. Day*, 353 U. S. 30 (1957), the Railway Labor Act of 1926 provided in Sections 7 and 8 (45 U. S. C. 157, 158) for the voluntary arbitration of "major disputes" arising in the making and changing of collective agreements and in Section 9 for judicial review and impeachment of such awards on limited grounds (45 U. S. C. 159); it also provided in Section 3 for the voluntary arbitration of "minor disputes" arising out of grievances and the interpretation "of collective agreements", but did not provide for any judicial consideration of awards made by such boards, in consequence of which parties to such disputes were free to litigate the disputes in the courts and the employees to strike over them; the 1934 amendments of the Railway Labor Act established the NRAB with exclusive primary jurisdiction of minor disputes and provided for the compulsory arbitration of such disputes by either party merely by referring the dispute to the Board with a full statement of the facts and all supporting data bearing upon it and subsection (p) of Section 3, First provided for a judicial proceeding to enforce awards and orders of the NRAB.

In the *Washington Terminal* case, *supra*, subsection (p) of Section 3, First as enacted in 1934 was held to preclude judicial review of *any* award of the NRAB which was adverse to *either* a railroad or to an employee *except* in an action under that subsection by or on behalf of an employee to enforce an award favorable to an employee in which action the court could enforce or deny enforcement or set aside the award.

Unlike Section 9 of the 1926 Act, which was re-enacted in 1934 and which limited the jurisdiction of the courts to set aside arbitration awards made in pursuance of Sections 7 and 8 of the Act, subsection (p) of Section 3, First, as enacted in 1934, did not limit the jurisdiction of courts

to deny enforcement or to set aside awards of the NRAB to any specified grounds.

Until this Court's decision in 1965 of *Gunther v. San Diego & Eastern Arizona R. Co.*, 382 U. S. 257, limiting the jurisdiction of courts in actions under subsection (p) as enacted in 1934 to deny enforcement or set aside awards of the NRAB only if such an award should be found to be "wholly baseless and completely without reason", the merits of disputes with respect to which the NRAB had made an award favorable to an employee were subject to judicial trial *de novo* by a district court and the judgment of the district court enforcing or denying enforcement or setting aside such awards was subject to review by Courts of Appeals under 28 U. S. C. 1291 and by this Court under 28 U. S. C. 1254 as shown by the *Gunther* case and others preceding it, *e. g.*, in the following cases the district court's denial of enforcement of an award of the NRAB was appealed and affirmed: *Dahlberg v. Pittsburgh & L. E. R. Co.*, 138 F. 2d 121 (3rd Cir. 1943); *Railroad Yardmasters, etc. v. Indiana Harbor Belt R. Co.*, 166 F. 2d 326 (7th Cir. 1948), *Brotherhood of Railway & Steamship Clerks v. Atlantic Coast Line R. Co.*, 253 F. 2d 753 (4th Cir. 1958), *Jones v. Central of Georgia R. Co.*, 331 F. 2d 649 (5th Cir. 1964) and in the following cases the district court ordered enforcement of an award and its decision was appealed and affirmed: *Virginian Railway Co. v. System Federation, etc.*, 131 F. 2d 840 (4th Cir. 1942) and *New Orleans Public Belt Railroad Commission v. Ward*, 195 F. 2d 829 (5th Cir. 1952).

Subsection (p) was amended in 1966 by P. L. 89-456, 45 U. S. C. 153, First (p) (1970 Supp.), hereinafter referred to only as "subsection (p)," to continue to provide for actions to enforce awards of the NRAB favorable to an employee which, together with the amendment of subsections (m) and (o), made awards and orders of the Board "final and binding" and "conclusive on the parties" in

such an action. It also prohibited the denial of enforcement or setting aside of such awards and orders of the NRAB except upon the stated grounds of (1) failure of the Board to comply with a requirement of the Act, (2) failure of the award and order of the Board to conform, or confine itself, to matters within the scope of its jurisdiction or (3) for fraud or corruption of a member of the Board making the award and order and additionally, although not stated in the text of subsection (p), a restatement of the ground stated by this Court in *Gunther*, that an award "was actually and indisputèdly without foundation in reason or fact." 2 U. S. Code Congressional & Administrative News, 89th Congress, Second Session, 1966, p. 2287.[1]

Since the decision of this Court in *Gunther* and the amendment of the Act by P. L. 89-456, decisions of district courts denying enforcement of an award and order of the NRAB have been subject to appellate review and reversed on appeal as occurred in *Sweeney v. Florida East Coast R. Co.*, 389 F. 2d 113 (5th Cir. 1968) and in *Brotherhood of Railroad Trainmen v. Central of Georgia R. Co.*, 415 F. 2d 403 (5th Cir. 1969).

It thus plainly appears from the foregoing that the court below had jurisdiction of the union's appeal from the de-

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[1] The committee gave consideration to a proposal that the bill be amended to include as a ground for setting aside an award "arbitrariness or capriciousness" on the part of the Board. *The committee declined to adopt such an amendment out of concern that such a provision might be regarded as an invitation to the courts to treat any award with which the court disagreed* as being arbitrary or capricious. This was done on the assumption that a Federal court would have the power to decline to enforce an award which was actually and indisputedly without foundation in reason or fact, and the committee intends that, under this bill, the courts will have that power. The limited grounds for judicial review provided in H. R. 706 are the same grounds that are provided in section 9 of the Railway Labor Act and also Public Law 88-108, which provided arbitration for the so-called work rules dispute. 2 U. S. Code Cong. & Admin. News, *supra*, p. 2287 (emphasis added).

cision of the district court denying enforcement of that part of the award and order of the NRAB requiring the railroad to reinstate J. W. Stuard to employment and to determine whether the district court erroneously denied enforcement of the award and, if so, to determine the amount payable to Stuard under the award and order of the NRAB.

We note that a comparison of the Award of the Board (A-17) with the affidavit of Walter Cassin which was attached to the railroad's motion for summary judgment (A-36) and with the district court's judgment (A-9-10, 12-13) makes it obvious that Cassin's affidavit was with respect to the usual manner in which the *railroad* had theretofore conducted investigations and that the railroad had conducted its investigation of its charge against Stuard in the *railroad's* usual manner which was condemned by the Board, and also makes it obvious that the district court misconstrued Cassin's affidavit as describing the usual procedure of the NRAB and also obviously based its finding that the NRAB had violated a requirement of the RLA on Cassin's affidavit of *what the railroad's usual practice had been—not the practice or procedure of the NRAB.*

If the court below had considered the merits of the union's appeal from the judgment of the district court denying enforcement of the NRAB award and order and had found the district court's decision erroneous—as the court below might well have found, as heretofore shown, clearly it would never have reached the question whether it had jurisdiction to review the other concurrent decision of the district court remanding the dispute, but would have reversed and remanded with directions to the district court to enforce the award and order of the NRAB. On the other hand, if the court below had found the district court's decision denying enforcement to be correct, a

determination it failed to make, it should then and only then have considered its jurisdiction to review the remand judgment. Hence the court below failed to make a determination of the correctness of the denial of enforcement, which *necessarily is prerequisite* to a consideration of its jurisdiction to review a remand judgment.

Thus, the question arises whether the decision of the district court, denying enforcement of the award which unquestionably is subject to appellate review, was rendered not subject to appellate review by a concurrent decision of the district court remanding the dispute to the NRAB.

This Court should determine the interrelationship of two such decisions of a district court since the jurisdiction of a district court to remand a dispute to the NRAB depends upon the existence of the same ground for which district courts may deny enforcement of awards and orders of the NRAB as will appear, *infra.*

Whether a district court erroneously determined the existence of the ground upon which it denied enforcement of an award and order of the NRAB unquestionably is subject to appellate review before a party, adversely affected by such a decision of a district court, may be subjected to the consequences of such a decision by a district court. Likewise, whether a district court erroneously determined the existence of the ground upon which it remanded a dispute to the NRAB should be subject to appellate review before the party adversely affected by such a decision of a district court may be subjected to the consequences of such a decision by a district court, as will appear *infra.*

II. The Decision of the Court Below That It Did Not Have Jurisdiction of the Union's Appeal From the Judgment of the District Court Remanding the Dispute With Respect to Which the NRAB Made the Award and Order Involved in This Case on the Ground That the District Court's Decision Was Not a Final Decision Ignores the Practical Effect and Consequence of Such a Remand Decision, Is at Variance With the Tests Prescribed by This Court for Determining the Finality of Judgments and Permits a New Form of Judicial *Trial De Novo of the Merits* of a Minor Dispute Contrary to This Court's Decision in the *Gunther* Case and to the Purpose and Provisions of the Amendments of the Railway Labor Act by Public Law 89-456.

A. District Court judgments remanding disputes to the NRAB are subject to appellate review under decisions of this Court and subsection (q) of Section 3 First of the Railway Labor Act.

As heretofore shown by the opinion in the *Washington Terminal* case and as also appears from the opinion in *Pennsylvania Railroad Co. v. Day, supra,* and *Union Pacific Railroad Company v. Price,* 360 U. S. 601 (1959), an employee could not, prior to 1966, obtain judicial review of an adverse award by the NRAB although a railroad could do so in the defense of an action by an employee under the 1934 subsection (p) of Section 3, First of the Act to enforce an award which was favorable to an employee and adverse to a railroad; and, as noted by this Court in *Transportation-Communication Employees Union v. Union Pacific R. Co.,* 385 U. S. 157 at 165 in footnote 4, courts could not remand cases to the NRAB prior to addition of subsection (q) to Section 3, First of the RLA on June 20, 1966 by Public Law 89-456. In that case, in which appeals were entertained and decided from the judgment

of the district court denying enforcement of the award of the Board, this Court was not concerned with the question involved in this case, although it employed subsection (q) of Section 3, First of the Act as amended by P. L. 89-456 to direct remand of the dispute to the Board making the award in question.

Subsection (q) was added to Section 3, First of the Act by P. L. 89-456 to correct the "incongruous situation" in which, under the 1934 subsection (p) of Section 3, First of the Act, an employee could not secure judicial review of an award of the NRAB adverse to an employee, although a railroad could secure such review in the defense of an action by an employee to enforce an award of the Board which was favorable to the employee and adverse to the railroad, 2 U. S. Code Congressional & Administrative News, 89th Congress, Second Session, 1966, pp. 2287-2290.

The 1966 subsection (q), hereinafter referred to only as "subsection (q)", provides for an action for a limited judicial review of awards and orders of the NRAB by a railroad or an employee *aggrieved* (1) by the failure of the Board to make an award in a dispute referred to it or (2) by any of the terms of an award or (3) by the failure of the Board to include certain terms in an award. It contemplates the action will be determined upon the basis of the record of the proceedings on which the action of the NRAB was based, which record it provides shall be filed by the Board in the case in which a petition to review the award of the Board was filed. It confers jurisdiction upon the courts "to affirm" the award and order of the Board or "to set it aside, in whole or in part" or to "remand the proceeding" to the Board "for such further action" as the Court "may direct". It also provides that, in such action, the "findings and order" of the Board shall be conclusive on the parties . . . except that the order of the [Board] may be set aside, in whole

or in part, or remanded to the [Board], for failure of the [Board] to comply with the requirements of [the RLA], for failure of the order to conform, or confine itself, to matters within the scope of the [Board's] jurisdiction, or for fraud or corruption by a member of the [Board] making the order.", and the last sentence of the new subsection(q) also provides that: "The judgment of the Court shall be subject to review as provided in sections 1291 and 1254 of Title 28."

The text of subsection (q) requires the existence of the same grounds which are required by subsection (p) for courts to have jurisdiction to enter any of the judgments for which subsection (q) provides and expressly provides, in the last sentence thereof, for appellate review of judgments of the district court for which subsection (q) provides before a party adversely affected by such a judgment is to be subjected to the consequences of such a judgment of a district court.

Clearly, under the decisions in the cases heretofore cited, a judgment of a district court in an action under subsection (p), requiring a railroad to comply with an award and order favorable to an employee is subject to appellate review in an appeal by the railroad. Likewise, a judgment in an action under subsection (q), which *in haec verba* is that "the award of the NRAB be and the same is hereby *affirmed*" would be subject to appellate review by either an employee or a railroad aggrieved by the award and the affirmance of the award by a district court. So also, under the decisions in the cases heretofore cited a judgment of a district court in an action under either subsection (p) or (q) which *in haec verba* is that "*enforcement* is *denied*" or that "the award and order of the NRAB be and the same is hereby *set aside*" in whole or in part unquestionably is subject to appellate review by the employee or railroad adversely affected—by the employee if the award had been favorable to him

and by the railroad if the award had been favorable to it.

The only additional judgment with respect to an award and order of the NRAB which a court may make under either subsection (p) or (q) is to *remand* the proceeding to the NRAB for such further proceedings as the court may direct.

Thus, under the decision of the court below the only additional judgment which the courts are authorized to make with respect to awards and orders of the NRAB is a judgment remanding the proceeding to the NRAB and is the only such decision which would not be subject to appellate review under the decision of the court below before the parties are subjected to the consequences of the decision of a district court, notwithstanding the last sentence of subsection (q) expressly provides for appellate review of such judgments of district courts.

To exempt such a judgment from appellate review, as the court below did in this case, and as a majority of the Court of Appeals did in the *Frisco* case, would be entirely at variance with the decisions of this Court with respect to what constitutes a final judgment and would, in effect, permit trial *de novo* of the merits of minor disputes to be accomplished exclusively by district courts contrary to the obvious purpose of the decision of this Court in the *Gunther* case and of Congress in enacting Public Law 89-456.

B. The court below ignored the practical effect test of this Court for determining the finality of district court judgments for the purpose of appellate review.

In *Gillespie v. United States Steel Corp.*, 379 U. S. 148 (1964), at 152, this Court said "But as this Court often has pointed out, a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case. . . . our cases long have recognized that whether a ruling is 'final' within the meaning of

§ 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality. Because of this difficulty this Court had held that the requirement of finality is to be given a 'practical, rather than a technical construction.' [and] . . . that in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'"

In *Brown Shoe Co. v. United States,* 370 U. S. 294 (1962) at 306 the Court said it had ". . . adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered 'final.' . . . [and that] . . . A pragmatic approach to the question of finality has been considered essential to the accomplishment of the 'just, speedy, and inexpensive determination of every action': the touchstones of federal procedure.".

The fact that the district court's decision was based upon the union's motion for partial summary judgment and the railroad's motion for summary judgment raised only a question of law since both motions conceded the non-existenee of any genuine issue as to any material fact with respect to whether the award and order of the NRAB should be enforced or set aside and denied enforcement; that issue thus became purely a question of law with respect to which nothing remained for the district court to consider and determine.

The necessary practical effect of a decision of a district court, in an action under subsection (p) in which the district court exercised the jurisdiction conferred by this Court in *Transportation Communication Employees Union v. Union Pacific R. Co., supra,* to remand to the NRAB for further arbitration a dispute with respect to which the

Board theretofore made an award favorable to an employee, necessarily denies the employee the benefits of the prior award and makes the employee's rights dependent upon the result of such further arbitration and another new award by the NRAB which may or may not be favorable to the employee.

Similarly, in an action by an employee under subsection (q) to review an award of the NRAB which was favorable to a railroad, and in which a district court remanded the dispute to the NRAB for further arbitration, the railroad would lose the benefit of the prior award and its rights would depend upon the result of the further arbitration and a new award by the NRAB.

Considering the practical effect and consequences of a judgment of a district court remanding a dispute to the NRAB for further arbitration would be a final judgment subject to appellate review under the decisions of this court at the time subsection (q) was enacted the same as every other judgment which the RLA empowered courts to make with respect to awards and orders of the NRAB, the last sentence of subsection (q) obviously was enacted to avoid there being a "twilight zone" with respect to the finality of such a remand judgment and to insure that such a judgment which it introduced into the RLA would be unquestionably subject to appellate review.

The court below declined to give any effect to the last sentence of subsection (q). If it is to be "read out" of the Act it should be first considered by this Court.

C. The decision of the court below and the decision of the Court of Appeals for the Eighth Circuit in the *Frisco* case, *supra*, open the door for an aggravated form of judicial *trial de novo of the merits* of minor disputes.

One of the obvious reasons for this Court's decision of the *Gunther* case, *supra*, and one of the stated purposes

for which P. L. 89-456 was enacted, was to put an end to judicial trial *de novo* of disputes which are within the exclusive jurisdiction of the NRAB and to eliminate delay and uncertainty as to the final disposition of such disputes by the NRAB and by litigation subsequent thereto, by making awards of the NRAB with respect to such disputes, final and binding as arbitration awards and subject to being denied enforcement, set aside, or remanded to the Board for further arbitration dependent upon the existence of the same limited grounds as had long been provided by Section 9 of the RLA for the impeachment of arbitration awards made pursuant to Sections 7 and 8 of the RLA with respect to "major disputes". 2 United States Code Congressional & Administrative News, 89th Congress, 2nd Session, 1966, pp. 2285-2290.

Under the decision of the court below and the Court of Appeals for the Eighth Circuit in the *Frisco* case, *supra,* district courts may require a trial *de novo* of the merits of minor disputes simply by continuing to remand disputes to the NRAB for re-arbitration of the merits of such disputes until the NRAB produces an award and order with which a district court will agree or disagree and not remand. See footnote 1, *supra.*

Prior to the decision of this Court in the *Gunther* case and the enactment of P. L. 89-456, the RLA authorized district courts to conduct an initial trial *de novo* of the merits of minor disputes; even in that situation the judgment of the district court was subject to appellate review. However, the district courts may now, under the decision of the court below, accomplish the same result, without such decision being subject to appellate review, by remanding the dispute for trial *de novo* by the NRAB. Thus the district courts may, without such decision being subject to appellate review, deprive a party of a favorable award because *there is no provision in the Railway Labor Act for a party to recover a favorable award lost as the result of*

a judgment of a district court remanding a dispute to the NRAB in the event the NRAB, as a result of further arbitration of the dispute, makes a contrary award.

III. The Decisions Upon Which the Court Below Relied Do Not Support the Decision of the Court Below.

The decision of the court below was principally based on the decision by a majority of three judges of the Court of Appeals for the Eighth Circuit in the *Frisco* case, *supra*, and on cases arising under the judicial review provisions of the Social Security Act and on cases subject to the United States Arbitration Act and the Labor Management Relations Act, which, in addition to being expressly not applicable to the RLA, do not admit of application by analogy under the scheme and provisions of the RLA for the arbitration of disputes arising under that Act and for judicial action with respect thereto.

Bohms v. Gardner, 381 F. 2d 283 (8th Cir. 1967), was an action under subsection (g) of the Social Security Act of 1935, 42 USC 405 (g) (Appendix D, A-27, 28) to review a final decision of the Secretary of Health, Education & Welfare disallowing a disability claim. The Court of Appeals for the Eighth Circuit carefully examined this Court's liberal and pragmatic approach for the determination of the finality of district court decisions for the purpose of appellate review and the underlying policy against piecemeal appeals with respect to a district court's remand order. The determination with respect to finality was then made in the narrow context of the judicial review provisions of the Social Security Act, which provides jurisdiction for district courts to remand a proceeding to the Secretary, at any time, for good cause shown, for the taking of additional evidence, but also, mandatorily provides for the record of further proceedings by the Secretary, including any additional evidence taken pursuant to the remand order to be *returned to the same district*

court which made the remand order (42 USC 405 (g), A-28).

Unlike the RLA, the Social Security Act specifically provides continuing judicial jurisdiction of a dispute arising under that Act to review the proceedings of the Secretary, both before and subsequent to judicial remand of a dispute to the Secretary. Thus, a decision that an interim remand order under that Act is not final and subject to appellate review does not support the decision of the court below with respect to the finality of a judgment of a district court under subsection (p) or (q) of the RLA remanding to the NRAB a dispute, with respect to which the NRAB theretofore had made an award, for the NRAB to conduct further arbitration of the dispute and make another award which would be subject to another action to enforce or review it which may be brought in the district court in any district through which the railroad operates.

Thus, under the Social Security Act, the district court has a continuing and broader jurisdiction of disputes arising under that Act than is conferred upon district courts by the RLA. *See* Appendix D.

Marshall v. Celebrezze, 351 F. 2d 467 (3rd Cir. 1965) and *Mayersky v. Celebrezze,* 353 F. 2d 89 (3rd Cir. 1965) also arose under subsection (g) of the Social Security Act, 45 U. S. C. § 405 (g). In both actions, as permitted by subsection (g), the Secretary of Health, Education & Welfare, before filing his answer, moved the district court to remand the case for the taking of additional testimony. Since the Social Security Act provides that "[T]he Court *shall,* on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action . . ." 42 U. S. C. § 405 (g), A-27 (emphasis added), and specifically provides for a continuation of the jurisdiction of the district court making the remand order to review subsequent action by the Secretary with respect to

the dispute, such remand order was so clearly not final that the Third Circuit dismissed both appeals *per curiam.*

Strathatos v. Arnold Bernstein S. S. Corp., 202 F. 2d 525 (2d Cir. 1953) was an action under the United States Arbitration Act, 9 U. S. C. § 1 et seq., to compel arbitration of an alleged breach of a contract subject to that Act as provided by a clause in the charter party for arbitration of disputes arising under it, 87 F. Supp. 1007 (S. D. N. Y. 1950). The District Court, under the provisions of 5 U. S. C. § 4 (Appendix D, A-30), ordered arbitration, retained jurisdiction of the action under the provisions of the Arbitration Act, and after arbitration and award, granted a motion for resubmission of the dispute to arbitration on the ground that one of the arbitrators was a member of the law firm which previously had represented the plaintiffs, 202 F. 2d at 526. The district court's grant of the motion, vacating the prior award and ordering resubmission to arbitration was held not to be a final order subject to appellate review. The Court of Appeals found the order granting resubmission to be "one step in the continuing process of arbitration here going forward" (202 F. 2d at 527) under the scheme of the Arbitration Act, which, in terms, provides for district courts to retain jurisdiction of the merits of the dispute and arbitration until it makes a final decree, 5 U. S. C. §§ 3, 4, 8, 10 (Appendix D, A-29 to 32).

Baltimore Contracting v. Bodinger, 348 U. S. 176 (1955), like *Stathatos v. Arnold Bernstein S. S. Corp.,* 202 F. 2d 525 (2d Cir. 1953), was an action for breach of contract of which the district court had initial jurisdiction but which was subject to the United States Arbitration Act. That Act, unlike the RLA, expressly provides jurisdiction for district courts to compel arbitration (9 U. S. C. § 4, A-30), to appoint arbitrators (9 U. S. C. § 5, A-31) and to stay further judicial proceedings until after arbitration in accordance with the agreement (9 U. S. C. § 3, A-29).

Hence the decisions in those cases subject to the U. S. Arbitration Act, that orders with respect to staying the judicial proceeding pending initial arbitration are not appealable, could not be applicable, even by analogy, to a judgment of a district court in an action under subsections (p) or (q) of the Railway Labor Act remanding a dispute to the NRAB for further arbitration of the merits of a dispute of which the court, under the provisions of the RLA, does not have initial much less continuing jurisdiction to determine the validity of a subsequent award made by the NRAB in pursuance of the remand order.

There is no provision in the RLA requiring the NRAB to return the record of its subsequent arbitration and award to the court remanding the dispute to the NRAB; even if it did so require, there is no provision in the RLA for the reinstatement of the prior award and order of the NRAB. Instead, the RLA provides that an action to enforce or review *any* award by the NRAB, which obviously includes any award which subsequently may be made in pursuance of a remand order, may be filed in the district court in *any* district through which the railroad operates.

The court below in this case, like the majority of the Court of Appeals for the Eighth Circuit in the *Frisco* case, *supra*, in basing its decision on cases arising in proceedings under statutes which, in terms, are not applicable to railroads and their employees (9 U. S. C., § 1, A-29) and on other decisions—inapposite to arbitration under the RLA—holding stay orders pending initial arbitration not to be appealable as final orders[2], failed to distinguish

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[2] *Alexander v. Pacific Maritime Ass'n*, 332 F. 2d 266 (9th Cir. 1964) (order by a court of equity staying disposition of other motions in its own proceedings pending initial arbitration, as provided by contract; no statutory action involved); *Armstrong-Norwalk Rubber Corp. v. Local Union, No. 283*, 269 F. 2d 618 (2d Cir. 1959) (order staying an action under § 301 of the Labor Management Relations Act, pending initial arbitration as provided by a collective agreement; the LMRA is not applicable to railway employees or to matters subject to the provisions of the RLA, 29 U. S. C., §§ 152 (2), 1952(3), 182).

such cases from cases arising under the RLA, in which district courts do not and cannot acquire original jurisdiction of the merits of minor disputes, but have jurisdiction only to enforce or review arbitration awards *theretofore made* by the NRAB, whether the first, second, or any subsequent award, with respect to the merits of the same dispute.

IV. **The Importance of Resolving the Questions Presented in This Case Is Emphasized by the Number of Instances in Which the Question Has Arisen and May Arise.**

The importance of the questions involved in this case with respect to the administration of the RLA is further demonstrated by the number of NRAB awards and orders which have been and could be denied enforcement and remanded for further arbitration by district courts, without being subject to appellate review as a matter of right.

Public Law 89-456 provided for compulsory arbitration by special boards of adjustment, which have become known as "P. L. Boards", to resolve disputes otherwise referable to the NRAB. The National Mediation Board anticipates that such Public Law (P. L.) Boards will reduce the case load of the NRAB. National Mediation Board, 35th Annual Report, 1969, pp. 46-47.

Under Section 3, Second of the RLA the awards and orders of P. L. Boards favorable to individual employees are subject, the same as NRAB awards and orders, to enforcement actions under subsection 3, First (p). 45 U. S. C. 153, Second, second paragraph (1970 Supp.).

Since P. L. 89-456 was enacted in 1966 until June 30, 1969, the NRAB made 3,778 awards and orders; P. L. Boards disposed of 3,092 cases during the same period, 1,652 of those during fiscal 1969. National Mediation Board, 34th Annual Report, 1968, p. 44; National Mediation Board, 35th Annual Report, 1969, pp. 45, 47.

District Courts, in enforcement actions under subsection (p) of Section 3 First of the RLA, 45 U. S. C., § 153, First (p), have denied enforcement and ordered the disputes remanded to the NRAB or to a P. L. Board in the following cases, which were decided since enactment of P. L. 89-456 on June 20, 1966: *Southern Pacific v. Wilson*, 378 F. 2d 533 (5th Cir. 1967) (district court decision unreported); *Gibson v. Missouri Pacific R. Co.*, Civ. No. 5176 (E. D. Tex., June 17, 1970), unreported, but previously called to the attention of this Court in the Supplemental Brief of the Union in *Transportation-Communication Div., etc. v. St. Louis-San Francisco Railway Co.*, No. 155 (October Term, 1970); *Order of Railway Conductors & Brakemen v. Erie, Lackawanna R. Co.*, 302 F. Supp. 1196 (N. D. Ohio, 1969); *Hanson v. Chesapeake & Ohio R. Co.*, 291 F. Supp. 401 (S. D. W. Va. 1968); *Brotherhood of Railway Signalmen v. Chicago, Milwaukee, St. P. & Pacific R. Co.*, 284 F. Supp. 401 (N. D. Ill. 1968).

Twelve P. L. Board awards were denied enforcement in the *Frisco* case, *supra*. The NRAB award involved in this case, and all other Adjustment Board awards and orders favorable to individual employees, with which a carrier may not comply provide the basis for potential enforcement actions under sub-section 3, First (p) which could result in a judgment denying enforcement and remanding the dispute to the Board. Such district court decisions necessarily require re-arbitration and a new Board award, which would *not*, under the decision of the court below and of the majority decision of the Court of Appeals for the Eighth Circuit in the *Frisco* case, *supra*, be subject to appellate review as a matter of right, even if patently erroneous.

It is thus important to the prompt and orderly administration of the RLA for this Court to determine the correctness of the decision of the court below, which, if allowed to stand, would allow district courts to re-establish trial *de novo* as heretofore shown.

CONCLUSION

For the foregoing reasons the Writ of Certiorari should be granted and (1) the judgment of the court below vacated and the case remanded with directions to the court below to determine the merits of the union's appeal, or (2) for the merits of the judgment of the court below to be determined by this Court upon briefs and arguments of the parties.

Respectfully submitted

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East St. Louis, Illinois
Attorney for Petitioner

February 16, 1971.

APPENDIX A

APPENDIX

In the United States Court of Appeals
for the Seventh Circuit

September Term, 1970—September Session, 1970

No. 18063

United Transportation Union, an Unincorporated Association,
Plaintiff-Appellant,
v.
Illinois Central Railroad Company, a Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois at East St. Louis.

October 30, 1970

Before Knoch, *Senior Circuit Judge*, and Kiley and Kerner, *Circuit Judges*.

Kerner, *Circuit Judge*. Plaintiff-appellant, United Transportation Union (Union), appeals from an order of the district court remanding its dispute with defendant-appellee, Illinois Central Railroad Company (Railroad), to the National Railroad Adjustment Board (Board) for further consideration. We dismiss plaintiff's appeal for want of appellate jurisdiction.

After an investigation, Employee J. W. Stinard had been discharged by the Railroad for violating Company

CONCLUSION

For the foregoing reasons the Writ of Certiorari should be granted and (1) the judgment of the court below vacated and the case remanded with directions to the court below to determine the merits of the union's appeal; or (2) for the merits of the judgment of the court below to be determined by this Court upon briefs and arguments of the parties.

Respectfully submitted,

JOHN H. HALEY, JR.
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Attorney for Petitioner

February 16, 1971.

APPENDIX A

In the United States Court of Appeals
for the Seventh Circuit

September Term, 1970—September Session, 1970

No. 18033

United Transportation Union, an Unincorporated Association,
Plaintiff-Appellant,
v.
Illinois Central Railroad Company, a Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois at East St. Louis.

October 30, 1970

Before Knoch, *Senior Circuit Judge,* and Kiley and Kerner, *Circuit Judges.*

Kerner, *Circuit Judge.* Plaintiff-appellant, United Transportation Union (Union), appeals from an order of the district court remanding its dispute with defendant-appellee, Illinois Central Railroad Company (Railroad), to the National Railroad Adjustment Board (Board) for further consideration. We dismiss plaintiff's appeal for want of appellate jurisdiction.

After an investigation, Employee J. W. Stuard had been discharged by the Railroad for violating Company

Rule G which forbids the use of intoxicants while on duty. The dispute was then submitted to the Board which concluded that

> [T]he evidence used to support the position of the carrier is almost totally hearsay and hence inadmissible. We believe that the claimant was denied a fair and impartial investigation for all of the foregoing reasons and we will accordingly set aside the dismissal complained of herein.

The Board allowed the Union's claim on behalf of Stuard for "reinstatement with seniority rights unimpaired and pay for all time lost."

The Railroad refused to comply with the award and order of the Board and, consequently, the Union instituted an enforcement suit in the district court under Section 3, First (q) of the Railway Labor Act, 45 U.S.C. § 153(q), 1970 Supp., which provides that a district court "shall have jurisdiction to affirm the order of the division [Board] or set it aside, in whole or in part, or it may remand the proceeding to the division [Board] for such further action as it may direct." The Union moved for a partial summary judgment requiring the Railroad to comply with the order of the Board reinstating Stuard.[1] The Railroad filed a cross-motion for summary dismissal of plaintiff's enforcement complaint, contending that the Board's order was null and void, since reliance upon hearsay evidence pursuant to a dismissal investigation is entirely proper.

The district court denied both motions for summary judgment and remanded the matter to the Board for further consideration because it believed that the Board should have allowed the hearsay evidence in the dismissal

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[1] The Union also requested that the court retain jurisdiction to determine the amount payable to Stuard under the award.

hearing. The court's remand order directed the Board "to specifically consider all the evidence presented in its entirety in keeping with the established procedures." From this remand order the Union appeals.

Section 3, First (q) allows appeal from a district court determination ". . . as provided in sections 1291 and 1254 of Title 28 [United States Code]." Section 1254 pertains to Supreme Court review of appellate decisions and is not relevant here. Section 1291, dealing with our jurisdiction to review district court decisions, provides in pertinent part:

> The courts of appeals shall have jurisdiction from all *final decisions* of the district courts of the United States. . . .
> 28 U.S.C. § 1291 [emphasis supplied]

Consequently, before we can review and determine the merits of the controversy, we must decide whether the court's remand order to the Board for further consideration was a "final decision," which invokes our appellate jurisdiction. We hold that the court's remand order was not a "final decision" and, therefore, dismiss the appeal for want of jurisdiction.

The Court of Appeals for the Eighth Circuit in *Transportation-Com. Div. v. St. Louis-San Francisco Ry. Co.*, 419 F. 2d 933, 935 (8th Cir. 1969), cert. denied October 12, 1970 (No. 155, October Term, 1970), recently faced with the identical question of the finality of a district court remand order to the National Railway Adjustment Board, stated:

> A remand order for further proceedings is not a final decision contemplated by § 1291. *Bohms v. Gardner, supra* [8 Cir., 381 F. 2d 283 (1967)]; *Marshall v. Celebrezze,* 3 Cir., 351 F. 2d 467; *Mayersky v. Celebrezze,* 3 Cir., 353 F. 2d 89; *Stathatos v.*

> *Arnold Bernstein S.S. Corp.*, 2 Cir., 202 F. 2d 525. . . . The trial court has neither enforced nor denied enforcement of the Board's awards. It has made no final determination of the merits of the controversy and it has not dismissed the action.

We are in agreement with the result and reasoning of the Eighth Circuit. The very nature of a remand order for "further consideration" indicates the district court has not entered a final order, but has temporarily sent the dispute back to the Board. The present situation is analogous to the treatment of stay orders by the district court pending arbitration proceedings. Where a district court has been faced with a dispute and has stayed such dispute pending an initial proceeding for arbitration on the merits, the courts have held that such a stay was not a final appealable order. *Baltimore Contractors v. Bodinger,* 348 U.S. 176, 179 (1955); *Alexander v. Pacific Maritime Association,* 332 F. 2d 266, 267 (9th Cir. 1964); *Armstrong-Norwalk Rubber Corp. v. Local Union No. 283,* 269 F. 2d 618 (2d Cir. 1959).

The Union contends that the failure of the district court to preserve its jurisdiction pursuant to its remand order and the possibility that review of any subsequent proceedings by the Board could be instituted in another court, is evidence that the district court's order is final. Regardless of whether the district court has retained jurisdiction, its remand order was not final and

> [W]hether or not the subsequent proceedings could be instituted in another court in our view has no material bearing on the crucial issue of whether the orders appealed from are final decisions.
> *Transportation-Com. Div. v. St. Louis-San Francisco Ry. Co.*, 419 F. 2d 933, 936 (8th Cir. 1969).

We find equally unpersuasive the Union's contention that the 1966 addition of Section (q) which for the first

time provided for a district court remand power, specifically intended to provide for appellate review of such remand orders. Neither a reading of Section (q) nor a study of the legislative history shows any indication that its drafters intended that remand orders be subject to appellate review. In the absence of legislative intent, we must rely on the plain meaning of the last sentence of Section (q)—"The judgment of the court shall be subject to review as provided in sections 1291 and 1954 of Title 28 [United States Code]." We determine it was the intent of Congress to provide for review of district court orders only in the event that these orders are final, and the district court's remand order was not final.

For the foregoing reasons, the appeal is dismissed.

Appeal Dismissed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

Friday, October 30, 1970

Before

Hon. Win G. Knoch, Sr., Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

Hon. Otto Kerner, Circuit Judge

No. 18033

United Transportation Union,
Plaintiff-Appellant,

vs.

Illinois Central Railroad Company,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois.

This cause came to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof,

It Is Ordered and Adjudged by this Court that this appeal from the judgment of the said District Court and the same is hereby, dismissed, with costs, in accordance with the opinion of this Court filed this date.

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

Wednesday, November 18, 1970

Before

Hon. Win G. Knoch, Sr. Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

Hon. Otto Kerner, Circuit Judge

No. 18033

United Transportation Union,
Plaintiff-Appellant,

vs.

Illinois Central Railroad Company,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois.

It Is Ordered by the Court that the petition for rehearing filed in the above-entitled cause be, and the same is hereby denied.

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

Thursday, December 3, 1970

Before

Hon. Otto Kerner, Circuit Judge

Hon. .....

Hon. .....

No. 18033

United Transportation Union,
Plaintiff-Appellant,

vs.

Illinois Central Railroad Company,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois.

On consideration of the motion of counsel for plaintiff-appellant,

It Is Ordered that the issuance of the mandate of this Court be stayed until February 16, 1971, subject to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

APPENDIX B

In the District Court of the United States
for the Eastern District of Illinois

Brotherhood of Railroad Trainmen,
an Unincorporated Association,
Plaintiff,

vs.

Illinois Central Railroad Company,
a Corporation,
Defendant.

Civil No. 68-54.

Juergens, Chief Judge

Memorandum and Order

(Filed April 9, 1969)

Plaintiff moves for partial summary judgment and defendant files its cross-motion for summary judgment.

Plaintiff Brotherhood of Railroad Trainmen brings this action to enforce an award of the National Railroad Adjustment Board (hereafter NRAB).

According to the various pleadings and briefs, it appears that the decision of the Referee of NRAB was founded, at least in part, on his rejection of testimony presented against the claimant. The reason for rejection is that said testimony and letters were read into the record and these letters were based on hearsay. In reaching this conclusion, the Referee stated that "* * * the evidence used to support the position of the carrier is almost totally hearsay and hence inadmissible." The briefs and affidavits show that in hearings conducted by NRAB similar evidence is almost invariably considered in com-

parable situations when presented in the manner in which the evidence was here presented.

The Court finds that the Referee failed to follow the established procedures for conducting hearings before NRAB, which have been almost universally followed in the First Division and in doing so in effect has attempted to apply his own brand of industrial justice. This type of action may not be condoned.

The Court will, therefore, remand the matter to the National Railroad Adjustment Board for further consideration on the merits in keeping with the procedures established by the National Railroad Adjustment Board in the First Division—the Board to specifically consider all the evidence presented in its entirety in keeping with the established procedures.

The parties have raised a number of points in support of their various motions for summary judgment, which the Court will not consider at this time, since it is clearly apparent that the matter is to be remanded to the National Railroad Adjustment Board, First Division, for further consideration.

It Is, Therefore, the Order of this Court that plaintiff's Motion for Partial Summary Judgment be and the same is hereby denied.

It Is the Further Order of this Court that defendant's Cross-Motion for Summary Judgment be and the same is hereby denied.

It Is the Further Order of this Court that the cause be remanded to the National Railroad Adjustment Board, First Division, for further consideration.

WILLIAM G. JUERGENS
Chief Judge

Dated: April 8, 1969.

Motion to Vacate Order and Judgment Entered April 9, 1969, and to Sustain Plaintiff's Motion for Partial Summary Judgment

(Filed April 18, 1969)

Plaintiff moves the court for an order vacating the order and judgment entered April 9, 1969 denying plaintiff's motion for partial summary judgment to enforce the Award and Order of the National Railroad Adjustment Board, First Division, and remanding the dispute which was the subject of the Award and Order to the NRAB, First Division and for an order granting plaintiff's motion for partial summary judgment.

The grounds for this motion are the following:

(1) The order denying enforcement of the Award and Order of the NRAB, First Division, is not based upon a showing by defendant nor upon a finding by the court that the First Division of the NRAB failed to comply with a requirement of the Railway Labor Act in making the award and order involved here.

(2) The order denying enforcement of the Award and Order of the NRAB, First Division, is not based on a showing by defendant nor upon a finding by the court that the Award and Order of the First Division of the NRAB does not conform to matters within the scope of the jurisdiction of the NRAB, First Division.

(3) The order denying enforcement of the Award and Order of the NRAB, First Division, is not based on a showing by defendant nor upon a finding by the court that the Award and Order of the First Division of the NRAB does not confine itself to matters within the scope of the jurisdiction of the NRAB.

(4) The order denying enforcement of the Award and Order of the NRAB, First Division, which is involved here is based upon a requirement established by this court which is not a statutory requirement included in the Railway Labor Act.

(5) For the foregoing reasons, separately and collectively, the court was and is without jurisdiction under the Railway Labor Act to deny enforcement of the Award and Order of the National Railroad Adjustment Board, First Division, and to remand the dispute to the National Railroad Adjustment Board, First Division, for further consideration by it on the merits; specifically to consider all the evidence presented it in its entirety including that which it heretofore considered hearsay.

In the District Court of the United States
for the Eastern District of Illinois

Brotherhood of Railroad Trainmen, an Unincorporated Association,
Plaintiff,

Illinois Central Railroad Company, a Corporation,
Defendant.

Civil No. 68-54

Juergens, Chief Judge

Memorandum and Order

(Filed July 10, 1969)

Plaintiff asks the court to vacate its order and judgment of April 9, 1969, and to sustain plaintiff's motion for partial summary judgment.

The court heretofore remanded the matter to the National Railroad Adjustment Board, First Division, for further consideration, stating that the Referee for the NRAB failed to follow established procedures and in doing so in effect attempted to apply his own brand of industrial justice.

Although not previously stated in hard language, the court now states that the action before the Board amounted to a failure of the Division to comply with the requirements of the Railway Labor Act and for that reason the matter was remanded for further consideration to permit the Board to correct the deficiency noted.

It Is, Therefore, the Order of this Court that plaintiff's motion to vacate the order and judgment entered April 9, 1969, and to sustain plaintiff's motion for partial summary judgment be and the same is hereby denied.

WILLIAM G. JUERGENS
Chief Judge

Dated: July 9, 1969

Notice of Appeal

(Filed August 5, 1969)

Notice is hereby given that Plaintiff, Brotherhood of Railroad Trainmen, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order and judgment entered April 9, 1969, denying the motion of Plaintiff, Brotherhood of Railroad Trainmen for partial summary judgment and remanding the matter to the National Railroad Adjustment Board, First Division, and from the order of this Court entered July 10, 1969, denying plaintiff's motion to vacate the order and judgment entered April 9, 1969.

APPENDIX C

National Railroad Adjustment Board
First Division

With Referee Don Hamilton

Corrected
AWARD 21 235
DOCKET 40 993

Parties to Dispute } Brotherhood of Railroad Trainmen
Illinois Central Railroad Company
Statement of Claim:

"Claim of Engine Foreman J. W. Stuard, Memphis, Terminal, for reinstatement with seniority rights unimpaired and pay for all time lost August 4, 1961 and subsequent dates until reinstated account unjustly removed from service August 11, 1961, following investigation conducted August 9, 1961, for allegedly violating Rule 'G'."

Findings:

The first division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Claimant Stuard was on duty August 4, 1961 as engine foreman. He was relieved by the terminal train master and held out of service, pending an investigation of an alleged violation of Rule G. The investigation was conducted August 9, 1961 and the claimant was dismissed from service August 11, 1961.

Rule G says, "The use of intoxicants or narcotics by employes subject to duty, or their possession or use while on duty, is prohibited."

The claimant seeks, "reinstatement with seniority rights unimpaired and pay for all time lost," from August 4, 1961 until reinstatement, for the reason that the carrier failed to prove the charge as preferred.

The evidence of the carrier consisted of the following:

Train Master M. E. Corzine testified and the investigating officer read a letter into the record which had allegedly been prepared by Corzine and sent to Superintendent Dugan. The letter contains absolute hearsay in the reporting of statements said to have been made by other parties.

Assistant Special Agent W. T. Lynn then testified and the investigating officer read a report into the record allegedly submitted by Lynn to Special Agent Ellis. This report contains primarily hearsay statements concerning what others told Lynn had occurred.

Additionally, the investigating officer allowed Lynn to testify as follows:

Q. "What type of beverage?"

A. "It was a beverage that contained alcohol. The train master had told me that this man had been drinking beer, so I assumed that it was beer that I smelled." The inadvisability of such hearsay is obvious. It is unnecessary to dwell on the prejudice that can be created by allowing such statements and improperly founded conclusions to be used as evidence.

Engineer Trafford testified and the investigating officer read a letter into the record which was addressed to L. Hogan, Jr., and reportedly signed by the witness Trafford and by Fireman Cowan. The letter is pure hearsay and purports to represent the conclusions of two persons, the truth of which assertions are testified to by one of the authors.

Trafford also testified that something was thrown out of the window at the Norris Grain Elevator switch, and the inference is made that it was a bottle of wine or beer. However, it is important to note that the carrier failed to substantiate this theory with any substantive evidence. There is no record of a search being made at the Norris Grain Elevator switch or of any attempt to corroborate the statements of the Witness Trafford. Gratuitous, prejudicial statements should not be permitted to be introduced in evidence. If the carrier knows that it will be unable to support assertions prejudicial to the claimant, it should make every effort to keep such statements out of the record. The investigating officer asked the witness a number of questions which required answers about matters within the peculiar knowledge of third parties. Examples of such questions put to Engineer Trafford would include:

Q. "Did the fireman observe this also?" and,

Q. "Could the fireman see Mr. Stuard from his position?" It is fundamental that a witness may only be allowed to testify as to those matters which he knows of his own knowledge. He may not testify as to what someone else heard, saw or thought.

Fireman C. W. Cowan then testified as to the letter which had been read into the record by the investigating officer in regard to Trafford's testimony.

The claimant Stuard then was called by the carrier and he made an affirmative denial of all charges regarding a violation of Rule G.

The claimant then called three witnesses: Yard Clerk C. A. Rogers; Switchman B. L. Lessel and Switchman E. Dillar. All of these witnesses supported the theory that the claimant was not drinking at the time of the incident giving rise to the incident.

All of the testimony presented against the claimant resulted from the use of letters and reports read into the record by the investigating officer. After reading the documents the officer would ask the witness if the document was true and correct and in each case the witness replied in the affirmative.

It is significant that none of the persons to whom the letters and reports were addressed testified. It is also significant that all of the authors of the documents were present and did in fact testify.

We hold that it was error for the investigating officer to read the reports and letters into the record and then ask the witnesses to affirm the contents thereof. The best evidence would be the direct testimony of the witnesses who each were present in this case. By using direct testimony the investigating officer would be able to eliminate the hearsay which was contained in the letters and reports. We further hold that letters and reports could properly be used in a situation where a witness were to testify inconsistently with the report or letter. This would be for the sole purpose of impeachment and not for the truth of the matter asserted. However, of course, in the instant case the carrier would not be able to impeach its own witness under the circumstances as developed in the case.

At the conclusion of the direct evidence by the witnesses, Trainmaster Hogan said: "I also stated in the notice of the investigation that your previous file and work record would be reviewed. I will now do that." The Trainmaster then proceeded to read into record numerous letters, newspaper clippings and uncorroborated reports of discipline assessed Stuard.

We are of the opinion that the prior record of the subject of the investigation is admissible in two specific instances. First after the investigating officer has made an independ-

ent determination that an infraction of the rules has occurred, the record would be admissible in helping to determine the quantum of discipline to be assessed. Secondly the record could be used to impeach the claimant if he denied prior discipline while testifying. In the instant case the matters read into the record consisted in large part of pure hearsay. This is especially true of the newspaper clippings. The service record of the claimant was improperly introduced because it failed to fall within either of the two categories, supra.

The organization makes quite an issue of the fact that the carrier did not take the claimant to a physician to determine if he was intoxicated. We believe the record shows this to be more of an after thought than a bona fide defense. Although the claimant stated at the hearing that he wanted to go to a doctor, the evidence is clear and convincing that he did not insist on being taken to a doctor, nor did he take advantage of the opportunity to contact one on his own, after he was released from work.

Therefore, we will discount the argument of the claimant that he was improperty treated when he was denied the services of a physician to determine if he was intoxicated. We must conclude that the evidence used to support the position of the carrier is almost totally hearsay and hence inadmissible. We believe that the claimant was denied a fair and impartial investigation for all of the foregoing reasons and we will accordingly set aside the dismissal complained of herein.

The carrier further argues that the claim is void for the reason that it seeks "pay for all time lost". It is urged that the claim should have been for all time lost less outside earnings and that failure to so plead nullifies the claim. We do not concur.

This Board adopted an interpretation to Award 21 088 on October 5, 1967 wherein was clearly pointed out that the

proper measure of damages was for all time lost and that no deduction for outside earnings should be permitted. In view of this recent precedent we hold that the contention of the carrier is without merit and that the claim should be allowed as presented.

AWARD:

Claim sustained.

National Railroad Adjustment Board
By Order of First Division
Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January, 1968.

Form 2

National Railroad Adjustment Board
First Division

AWARD 21 235
DOCKET 40 993

Order

TO: ILLINOIS CENTRAL RAILROAD COMPANY

MR. W. J. CASSIN, DIRECTOR OF LABOR RELATIONS

The carrier addressed, party to the docket identified above, is hereby ordered to make effective the award, which is attached and made a part hereof, as therein set forth and, if the award includes a requirement for the payment of money, to pay the employe (or employes) the sum to which he is (or they are) entitled on or before February 29, 1968.

National Railroad Adjustment Board
By Order of First Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January, 1968.

APPENDIX D

JUDICIAL CODE—28 USC

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supremc Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or re-

quire the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 923.

RAILWAY LABOR ACT

As Amended in 1934

45 USC 153, First

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known

as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court

of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

* * * * * * * *

(u) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. . . .

RAILWAY LABOR ACT

As Amended in 1966 by P. L. 89-456

45 USC 153, First (1970 Supp).

* * * * * * * *

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the award shall be furnished to the respective parties of the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute:

* * * * * * * *

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Ad-

justment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment

Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

Social Security Act

42 U. S. C., § 405, 49 Stat. 624, c. 531, Title II, Aug. 14, 1935

* * * * * * *

Judicial Review

(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. **Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business,** or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of

his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. **The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive,** and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. **The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall,** after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and **shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.** Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office. 45 U. S. C., § 405. (Emphasis added.)

United States Arbitration Act, 9 U. S. C.

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but **nothing herein contained shall apply to** contracts of employment of seamen, **railroad employees**, or any other class of workers engaged in foreign or interstate commerce. July 30, 1947, c. 392, § 1, 61 Stat. 669. (Emphasis added.)

§ 3. Stay of proceedings where issue therein refarable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court in which such suit is pending**, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement**, providing the applicant for the stay is not in default in proceeding with such arbitration. July 30, 1947, c. 392, § 1, 61 Stat. 669. (Emphasis added.)

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the **court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.** If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to

a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the **court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.** July 30, 1947, c. 392, § 1, 61 Stat. 669. (Emphasis added.)

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator. July 30, 1947, c. 392, §1, 61 Stat. 669.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings,

and **the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.** July 30, 1947, c. 392, § 1, 61 Stat. 669. (Emphasis added.)

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) **Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.** July 30, 1947, c. 392, § 1, 61 Stat. 669. (Emphasis added.)

APPENDIX E

Excerpts from UTU Brief as Plaintiff-Appellant, *United Transportation Union v. I. C. R. Co.*, No. 18,033 (7th Cir. 1970), pp. 24, 30.

Appeals from decisions of District Courts in actions under subsection (p) of Section 3, First of the Railway Labor Act to enforce awards of the NRAB enforcing or denying enforcement or setting aside awards of the NRAB unquestionably were and are within the jurisdiction of the Courts of Appeals under the provisions of 28 USC 1291 as shown by *Estes v. Union Terminal Co.*, 89 F. 2d 768 (5th Cir. 1937); *Thomas v. Texas & N. O. R. Co.*, 118 F. 2d 75 (5th Cir. 1941); *System Federation v. Louisiana & A. R. Co.*, 119 F. 2d 509 (5th Cir. 1941); *Virginian Ry. Co. v. System Federation, etc.*, 131 F. 2d 840 (4th Cir. 1942); *Railway Express Agency, Inc. v. Order of Railroad Telegraphers*, 137 F. 2d 46 (5th Cir. 1943); *Dahlberg v. Pittsburgh & L. E. R. Co.*, 138 F. 2d 121 (3rd Cir. 1943); *Joint Council Dining Car Employees*, . . .

II

The District Court Exceeded Its Jurisdiction and Erred by Denying Enforcement of the Award and Order of the National Railroad Adjustment Board and in Remanding to the NRAB the Dispute With Respect to Which the Board Made the Award That J. W. Stuard Had Been Unjustly Discharged by the Railroad in Violation of the Collective Agreement.

A. The Railway Labor Act does not require the discharge by a railroad of one of its employees to be based upon any evidence of an act or omission by the employee except as may be provided by an agreement to which the railroad is subject.

In *Virginian Railway Co. v. System Federation*, 300 U. S. 515 (1937), the Supreme Court sustained the con-

stitutionality of the Railway Labor Act and the duty imposed by it upon railroads to engage in collective bargaining with a union which had been certified by the National Mediation Board as the representative of employees of the railroad and in so doing, said, 300 U. S. at 559:

> ". . . The provisions of the Railway Labor Act . . . do not 'interfere with the normal exercise of the right of the carrier to select its employees or to discharge them.' See the Brotherhood of R. & S. S. Clerks Case, supra, 281 U. S. 571, 74 L. ed. 1046, 50 S. Ct. 427 . . ."

In *Brooks v. Chicago R. I. & P. R. Co.*, 177 F. 2d 385 (8th Cir. 1949) the railroad had entered into a collective agreement with a union which provided that: "an employee who has been in the service of the Railway thirty (30) days shall not be discharged for any cause without first being given an investigation" and also that "No employee shall be disciplined without a fair hearing by designated officer of the carrier" and further that "at a reason- . . .

Excerpts from Illinois Central's Brief as Defendant-Appellee, *United Transportation Union v. I. C. R. Co.*, No. 18,033 (7th Cir. 1970), pp. 18-19.

II

The District Court was correct in remanding the dispute to the N.R.A.B.

Should this Court determine that the Order of remand of the district court is appealable, the Court must decide whether the court below was correct in remanding the dispute to the N.R.A.B. for further proceedings.

In the following portion of our Argument we shall demonstrate that the court below was correct in holding that

the referee failed to comply with the requirements of the Act in ruling hearsay evidence inadmissible; that even if the referee had the power to make such ruling, the finding of hearsay was erroneous as a matter of fact and law; that the referee's decision to award the employee a day's pay for each day he was withheld from service likewise resulted from the referee's failure to comply with the requirements of the Act; and that the N.R.A.B., First Division, further failed to comply with the requirements of the Act by refusing to grant the railroad's petition for an oral rehearing.

Before we proceed with these issues, however, we must first take up the fundamental issue raised by the UTU which is whether courts have the power, at all, to review decisions of the N.R.A.B.

Excerpts from UTU Petition for Rehearing, ***United Transportation Union v. I. C. R. Co.,*** **No. 18,033 (7th Cir. 1970), p. 10.**

Decisions of district courts which, ***without remand,*** deny enforcement or set aside awards of the NRAB unquestionably are subject to appellate review under the provisions of subsections (p) and (q) of Section 3, First of the Railway Labor Act, as heretofore shown. Where the District Court *both* denies enforcement *and* remands, as was done in this case, merely *tacking on the remand* should not deny appellate review of the order denying enforcement of the award, which *standing alone, without remand,* is unquestionably a final judgment. But under the decision of this Court until such a judgment, *without remand,* should be entered, all judgments remanding disputes to the NRAB for further arbitration and a new award by the Board, would not be subject to appellate review no matter how patently erroneous such remand judgment might be.

Wherefore, UTU respectfully prays the Court to set aside its decision denying the appeal and to consider it

upon the merits of the judgment of the District Court denying enforcement of the award and the judgment of the District Court remanding the dispute for further arbitration and a new award and to remand the cause to the District Court with directions to enforce the award in accordance with the Union's motion for partial summary judgment.

Excerpt from Affidavit of Walter J. Cassin, Director of Labor Relations, Illinois Central R. Co., December 24, 1968.

5. The current procedure for the admission of evidence on behalf of the IC, at investigations held pursuant to Article 58 of the current collective bargaining agreement, has been in effect for at least 26 years, the length of my service with the IC. In those instances in which a witness has written a letter or prepared a written report concerning the incident under investigation, the consistent practice has been to read the letter or report into the record, after which the witness is asked whether he in fact prepared the document and, if so, to affirm that the statements of his contained therein are true. The witness then may be asked additional questions by the investigating officer or a representative of the IC, following which the witness is subject to cross-examination by the employee or his designated representative concerning any matter testified to including any matter contained in the letter or report. To my knowledge, the BRT has never raised objection to the introduction of evidence in this manner either at an investigation or before the National Railroad Adjustment Board as a ground for setting aside the decision of the investigating officer. There are approximately 100 investigations each year.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1350

UNITED TRANSPORTATION UNION,
Petitioner,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. The Brief in Opposition does not substantially disagree with the basis for the first reason advanced by Petitioner, hereinafter the "Union", for the Writ of Certiorari to be granted—that the court below had jurisdiction of the Union's appeal from the district court's judgment denying enforcement of the Award and Order of the National Railroad Adjustment Board, hereinafter "NRAB", and should have decided the question.

Respondent, hereinafter the "Railroad", agrees (Br. 1, 7, 15-16) that the composite decision of the district court consisted of three distinct decisions: (1) denial of the union's motion for summary judgment enforcing the award of the NRAB; (2) denial of the railroad's motion for summary judgment setting aside the Award of the NRAB and dismissing the complaint; and (3) remanding the dispute to the NRAB for re-arbitration as stated by petitioner (Ptn. 10-11, 14-15). As the case stood in the district court when it made those orders it presented only a question of law since the motions of both the union and railroad represented that there was no genuine issue as to any material fact.

The railroad argues (Br. 8-9) that, if the remand order is put aside, all that would remain of the district court's judgment would be two orders which the railroad asserts would be "interlocutory orders"—one denying the union's motion to enforce the award and the other denying the railroad's motion to set aside the award and to dismiss the complaint, neither of which would be subject to appeal.

But the railroad also states (Br. 9) that if the district court had held the Award and Order of the NRAB to be void and unenforceable on the railroad's motion there would have been nothing to remand and that what the district court held was not that the Award and Order were void and unenforceable but rather that the NRAB had not rendered an award and order that complied with the requirements of the Railway Labor Act, hereinafter "RLA", which could be enforced or set aside.

Notwithstanding those statements by the railroad, what the district court did was to deny the union's motion to enforce the award on the ground the NRAB had failed to comply with the requirements of the RLA in making the award and, upon the same ground, remanded the dispute to the board. Ptn. App. B, pp. A-9–A-13.

Thus it is apparent that after the district court's denial of enforcement of the award on one of the grounds specified by subsections (p) and (q) of Section 3 First of the RLA, 45 USC 153 First (p) and (q), there was, as the railroad states, "nothing to remand" (Br. 9).

Clearly, the court below had jurisdiction of the union's appeal from the district court's judgment denying enforcement of the award and, if it had found the district court eroneously denied enforcement of the award, it would never have reached the remand question, as shown in the Petition at pages 15-16.

2. The Brief in Opposition further emphasizes the necessity for this Court to determine the question with respect to appellate review of remand orders, to avoid the injustice which otherwise will be done to railroads and their employees if the decisions of the court below and of the majority of the Court of Appeals for the Eighth Circuit in *Transportation-Communication Employees Union v. St. Louis-San Francisco R. Co.*, 419 F.2d 933 (1969), *cert den.*, ... U.S. ..., 91 S.Ct. 34 (1970), hereinafter referred to as the *Frisco* case, are allowed to stand.

Throughout its Brief in Opposition, the railroad advances arguments which presuppose that the district court acquired continuing jurisdiction of the arbitration of the basic dispute, such as district courts have of arbitration under the United States Arbitration Act and as the courts have under the Social Security Act of decisions of the Secretary of Health, Education & Welfare.

The basic dispute between the parties was whether the railroad violated the collective agreement in discharging its employee and whether the employee should be reinstated and paid for time lost in accordance with the provisions of the collective agreement. Such was the dispute that was submitted to the NRAB which found and made an award in favor of the employee (Ptn. App. C, pp. A

14-A 19; *Union Pacific R. Co. v. Price,* 360 U.S. 601 at 606-607 (1959)).

Since the NRAB had made such an award, the basic dispute has evolved into a dispute whether the courts should enforce or set aside the award or require the basic dispute to be re-arbitrated by the NRAB under the decision of this Court in *Gunther v. San Diego & Eastern R. Co.,* 382 U.S. 257 (1965) and subsections (p) and (q) of Section 3 First of the RLA, 45 USC 153 First (p) and (q), (1971 Supp.).

Decisions in cases arising under the United States Arbitration Act are partly the basis for the decision of the majority of the court in the *Frisco* case (419 F.2d at 935-6), for the decision of the court below in this case (Ptn. App. A, pp. A 3 to A 4, 433 F.2d at 568) and for the railroads' argument (Br. 13-17) that the district court's order in this case is not subject to appellate review.

However, the court below, the majority of the court in the *Frisco* case and Respondent ignore the other provisions of the United States Arbitration Act which provide for the entry of a final judgment (9 USC 11-13) which clearly would be subject to appellate review. In an appeal from such final judgment the orders held interlocutory and not subject to appellate review—in the cases relied upon by the court below, the majority of the court in the *Frisco* case and by the railroad in its Brief in Opposition—clearly would be subject to appellate review and correction if found to have been erroneous. *Mesabi Iron Co. v. Reserve Mining Co.,* 270 F.2d 567, 569 (8th Cir. 1959).

Thus, under the United States Arbitration Act, a party losing the benefit of an arbitration award as the result of an erroneous, unappealable, interlocutory order requiring re-arbitration, could recover the benefit of such award. See *Stathatos v. Arnold Bernstein S.S. Corp.,* 202 F.2d 525 (2d Cir. 1953) and *American Guaranty Co. v. Caldwell,* 72 F.2d 209 (9th Cir. 1934).

Likewise, decisions arising under the Social Security Act are also partly the basis for the decision of the court below in this case (Ptn. App. A, pp. A 3; 433 F.2d at 568) and for the decision of the majority of the court in the *Frisco* case (419 F.2d at 933), on which the railroad relies (Br. 10-11, 16-17) for the proposition that the district court's remand order in this case is not subject to appellate review.

However, the court below, the majority of the court in the *Frisco* case and the railroad in its Brief in Opposition in this case ignore the provisions of the Social Security Act, 42 USC 405 (q) (Ptn. App. A, pp. A 27, A 28), for the court to enter a judgment which "shall be subject to review in the same manner as a judgment in other civil actions". Thus, under the Social Security Act, as under the United States Arbitration Act, erroneous, interim, unappealable decisions remanding questions to the Secretary of Health, Education & Welfare may be reviewed and corrected in an appeal from such judgment.

Clearly, Congress intended remand orders, which it introduced into the RLA in 1966 by subsection (q) of Section 3 First of the Act, to be subject to appellate review by providing, in the last sentence of subsection (q) that judgments of district courts affirming awards of the NRAB, setting aside such awards in whole or in part or remanding proceedings to the NRAB "shall be subject to review as provided in Sections 1291 and 1254 of Title 28".

If decisions arising under the United States Arbitration Act and Social Security Act are to be relied upon as the basis for denying appellate review of remand orders under the RLA, then the *complete scheme and all of the provisions of the United States Arbitration Act and of the Social Security Act* should be held applicable to the arbitration of minor disputes under the RLA, to provide for appellate review of orders of district courts remanding

disputes to the NRAB for re-arbitration or else effect should be given the last sentence of subsection (q) of Section 3 First of the RLA which the court below and the majority of the court in the *Frisco* case declined to do and, in so declining, insulated such remand order from appellate review as shown in the Petition, pp. 20-22.

It would be more accurate and appropriate under the provisions of the RLA to treat remand orders made by district courts under subsections (p) and (q) of Section 3 First of the RLA as appealable orders directing arbitration, as such orders are held to be under *Goodall-Sanford, Inc. v. United Textile Workers of America*, 353 U.S. 550 (1957) rather than to apply decisions arising under the United States Arbitration Act or the Social Security Act.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and in this Reply to the Brief in Opposition, the Writ of Certiorari should be granted and (1) the judgment of the court below vacated and the case remanded with directions to the court below to determine the merits of the union's appeal, or (2) for the merits of the judgment of the court below to be determined by this Court upon briefs and arguments of the parties.

Respectfully submitted

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March 17, 1971.

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IN THE

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OCTOBER TERM, 1970

No. 1350

UNITED TRANSPORTATION UNION,

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On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the Order of the district court, which denied the union's motion for summary judgment to enforce the award and order of the National Railroad Adjustment Board, and which denied the railroad's motion for summary judgment to set aside the same award and order, but instead, which remanded the dispute to the NRAB for further arbitration proceedings, constituted a "final decision" under 28 U.S.C. Section 1291.

STATEMENT OF THE CASE*

On August 4, 1961, engine foreman J. W. Stuard was in charge of an assignment which began work at 3:30 p.m. and performed general yard and industry switching in Memphis, Tennessee. Approximately six hours later, Stuard was removed from duty by a trainmaster of the railroad on the ground that Stuard had violated Rule G of the Illinois Central's "Rules and Regulations." Rule G provides:

> "G. The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited."

Article 22 of the applicable collective bargaining agreement between the railroad and the union sets forth the procedure which the railroad is required to follow in discipline cases.

Pursuant to the provisions of Article 22, the railroad sent a letter to the employee notifying him that an investigation had been scheduled for the purpose of determining whether "you used or were under the influence of an intoxicant while on duty as engine foreman at approximately 9:30 p.m., August 4, 1961"; that the employee's "file and previous work record will be reviewed at the investigation"; and that the employee would be permitted "to bring a representative and witnesses in your behalf."

The investigation was conducted on August 9, 1961. The employee was represented at the hearing by a local chairman of the union, and the employee presented two

---

* The Petitioner United Transportation Union is referred to herein as the "union" and the Respondent Illinois Central Railroad Company as the "railroad."

witnesses on his behalf. A formal transcript of the proceedings was taken.

The railroad called several witnesses. In each instance, the trainmaster conducting the investigation would read into the record a document, in the form of a letter or report, which the witness had prepared concerning the event under investigation. After the document had been read, the witness was asked to affirm that he had prepared the document and that the statements contained therein were true and correct to the best of his knowledge. The witness thereafter was questioned further by the trainmaster and following such testimony the employee's representative cross-examined the witness.

On August 11, 1961, the trainmaster rendered his decision, finding that Stuard had violated Rule G, and he was dismissed from service.

In accordance with Article 22 of the collective bargaining agreement, the employee appealed the decision of dismissal, first to the appropriate superintendent of the railroad and thereafter to the highest operating officer of the railroad designated to handle such disputes. The employee's claim was denied at both steps of the grievance procedure.

On March 31, 1964, the union filed a claim with the National Railroad Adjustment Board, First Division, (herein referred to as the "NRAB"), pursuant to Section 3, First of the Railway Labor Act (45 U.S.C. sec. 153), requesting that Stuard be reinstated with back pay for all time lost.

The partisan members of the First Division, consisting of five members appointed by the carriers and five members appointed by the unions, could not agree on the

disposition of the claim and, pursuant to Section 3, First (1) of the Act (45 U.S.C. sec. 153, First (1)), a neutral referee was appointed to sit with the Division.

On January 30, 1968, the NRAB issued an award and order sustaining the claim of Stuard for reinstatement and back pay. In rendering its decision, the NRAB concluded "that the evidence used to support the position of the carrier is almost totally hearsay and hence inadmissible." (Petition, A-18.) The railroad refused to comply with the award and order and a suit for enforcement was instituted by the union on April 26, 1968 pursuant to Section 3, First (p) of the Railway Labor Act (45 U.S.C. sec. 153, First (p)). Issue was joined by the railroad on October 9, 1968. Thereafter, on October 23, 1968, the union filed a motion in the district court for partial summary judgment in its favor enforcing the award and order, and on December 26, 1968, the railroad cross-moved for summary judgment requesting that the complaint be dismissed and that the award and order be set aside.

On April 9, 1969, the district court entered a Memorandum and Order denying both motions for summary judgment. The district court found that the NRAB had erred in refusing to consider the evidence of the railroad on the basis that such evidence was inadmissible because it was hearsay. The court remanded the dispute to the NRAB (Petition, A-10):

> "for further consideration on the merits in keeping with the procedures established by the National Railroad Adjustment Board in the First Division—the Board to specifically consider all the evidence presented in its entirety in keeping with the established procedures."

The district court concluded (Petition, A-10):

> "The parties have raised a number of points in support of their various motions for summary judgment, which the Court will not consider at this time, since it is clearly apparent that the matter is to be remanded to the National Railroad Adjustment Board, First Division, for further consideration."

On April 19, 1969, the union filed a motion in the district court to vacate the Order of April 9, 1969, and to sustain the union's motion for partial summary judgment. On July 10, 1969, the district court entered a supplemental Memorandum and Order denying the motion. The court stated (Petition, A-13):

> "Although not previously stated in hard language, the Court now states that the action before the Board amounted to a failure of the Division to comply with the requirements of the Railway Labor Act and for that reason the matter was remanded for further consideration to permit the Board to correct the deficiency noted."

An appeal was taken by the union to the court below, and on October 30, 1970, the court of appeals dismissed the appeal on the ground that it did not have jurisdiction because the remand order of the district court did not constitute a "final decision" under 28 U.S.C. Section 1291.

The court stated (Petition, A-3-4):

> "The Court of Appeals for the Eighth Circuit in *Transportation-Com. Div.* v. *St. Louis-San Francisco Ry. Co.*, 419 F. 2d 933, 935 (8th Cir. 1969), cert. denied October 12, 1970 (No. 155, October Term, 1970), recently faced with the identical question of the finality of a district court remand order to the National Railway [sic] Adjustment Board, stated:

> "'A remand order for further proceedings is not a final decision contemplated by § 1291. . . . The trial court has neither enforced nor denied enforcement of the Board's determination of the merits of the controversy, and it has not dismissed the action.'

"We are in agreement with the result and reasoning of the Eighth Circuit. The very nature of a remand order for 'further consideration' indicates the district court has not entered a final order, but has temporarily sent the dispute back to the Board. The present situation is analogous to the treatment of stay orders by the district court pending arbitration proceedings. Where a district court has been faced with a dispute and has stayed such dispute pending an initial proceding for arbitration of the merits, the courts have held that such a stay was not a final appealable order. *Baltimore Contractors* v. *Bodinger,* 348 U.S. 176, 179 (1955); *Alexander* v. *Pacific Maritime Association,* 332 F. 2d 266, 267 (9th Cir. 1964); *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283,* 268 F. 2d 618 (2d Cir. 1959)."

THE WRIT SHOULD NOT BE GRANTED

The union's position in the court below, in its brief and oral agreement, was that in an action to enforce an award and order of the NRAB, a decision of a district court remanding the dispute to the NRAB for further arbitration proceedings is tantamount to a final order setting aside an award and order and thus subject to appellate review. This Court, five months ago, refused to grant a writ in a case raising the same issue involved here. *Transportation-Communication Employees Union* v. *St. Louis-San Francisco Ry.*, 419 F. 2d 933 (8th Cir. 1969), *cert. den.* 91 S. Ct. 34 (1970) (referred to herein as the *"Frisco"* case).

Although continuing to press the same contention, the union now seeks to interject a new argument, apparently by dividing the old one in two parts. In the remaining portion of this Opposition we will demonstrate that no matter how the union slices its argument, it comes down to a proposition that now has been rejected by the courts of appeals for the two circuits that have considered it, that is contrary to prior analogous decisions of this Court and lower courts, and that can find no support in the Railway Labor Act or its legislative history.

1. The union's first point (Petition, at 10-16) is that the court below erred in considering that the union appealed only from the district court's remand order, but instead, that the union also was appealing from the district court's order denying the union's motion for partial summary judgment to enforce the award and order of the NRAB. The union asserts (Petition, at 16):

> "Thus, the question arises whether the decision of the district court denying enforcement of the award which unquestionably is subject to appellate review, was rendered not subject to appellate review by a concur-

> rent decision of the district court remanding the dispute to the NRAB."

The flaw in the union's assertion is that if the remand order of the district court is put aside, all that remains is an interlocutory decision of the district court denying the motions of both sides for final judgment.

The union apparently ignores the fact that the district court not only denied the union's motion for summary judgment to enforce the award and order, it likewise denied the railroad's motion for summary judgment to set aside the same award and order. If not for the remand, the case would have continued before the district court until a final judgment was entered either enforcing or denying enforcement of the award and order. Thus the district court held (Petition, A-10):

> "The parties have raised a number of points in support of their various motions for summary judgment, which the Court will not consider at this time, since it is clearly apparent that the matter is to be remanded to the National Railroad Adjustment Board, First Division, for further consideration.
>
> "It Is, Therefore, the Order of this Court that plaintiff's Motion for Partial Summary Judgment be and the same is hereby denied.
>
> It Is the Further Order of this Court that defendant's Cross-Motion for Summary Judgment be and the same is hereby denied."

The union cites several cases in which decisions of district courts denying enforcement to awards and orders of the NRAB were subject to appellate review. In each of such cases, however, the court entered a *final judgment* holding the award and order to be unenforceable and dismissed the action. There is no question that under such circumstances the final judgments of the district courts

were subject to review. There likewise is no question that the present case, in which the district court *specifically denied* the railroad's motion to set aside the award and order and dismiss the complaint, does not fall into the same category. The rationale of the district court in remanding the dispute to the NRAB was not that the award and order were void and unenforceable*, but rather, that the NRAB had not yet rendered an award and order that complied with the requirements of the Railway Labor Act which could be enforced or set aside.

In essence, the question the union seeks to present to this Court is whether a denial of a motion for summary judgment, which does not at the same time enter a final judgment against the movant, constitutes a "final decision" under 28 U.S.C. Section 1291. The union does not cite a single case or a single compelling reason for this Court to reverse the well-settled principle that such interlocutory orders are not subject to appeal.

2. The second point of the union's petition (at 17-24) asserts that an order of a district court remanding a dispute to the NRAB for further arbitration proceedings is subject to appellate review under decisions of this Court and under Section 3, First (q) of the Railway Labor Act (45 U.S.C. sec. 153, First (q)).

The union states that remand orders to the NRAB are subject to appellate review under decisions of this Court but does not cite a single decision so holding. There is none. The only cases referred to by the union are those holding that a *final judgment* of a district court either enforcing an award and order of the NRAB or denying

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* Indeed, if it had so held, there would have been nothing to remand.

enforcement by dismissing a suit for enforcement are subject to appellate jurisdiction. The court below did not disagree with the holding of these cases. The issue here, however, is whether a remand for further arbitration is the same as a final judgment setting aside an award and order. With respect to this issue, the only decisions directly in point are those of the court below and the Court of Appeals for the Eighth Circuit in the *Frisco* case, *supra*. In both cases, the courts found that remand orders are not "final decisions" under 28 U.S.C. Section 1291 and therefore not subject to appellate jurisdiction.

The union argues that the remand order must be considered a final order because the district court did not retain jurisdiction of the case, but it points to nothing in the record of proceedings before the district court to show that the lower court did not retain jurisdiction. Indeed, in remanding the dispute to the NRAB, the district court expressly left open "a number of points in support of [the parties] various motions for summary judgment, which the Court will not consider *at this time*." (Emphasis added.) Furthermore, because the complaint was not dismissed it would appear that upon the issuance of a proper award and order of the NRAB the union would be allowed to seek enforcement of such award and order in the same action should the railroad fail or refuse to comply. Moreover, even if the district court had released jurisdiction of the action, it would have no bearing on the question of whether its remand order was final. The court below considered the contention, stating (Petition, A-4):

> "The Union contends that the failure of the district court to preserve its jurisdiction pursuant to its remand order and the possibility that review of any subsequent proceedings by the Board could be in-

> stituted in another court, is evidence that the district court's order is final. Regardless of whether the district court has retained jurisdiction, its remand order was not final and
>
> > "'[W]hether or not the subsequent proceedings could be instituted in another court in our view has no material bearing on the crucial issue of whether the orders appealed from are final decisions.'
>
> *"Transportation-Com. Div.* v. *St. Louis-San Francisco Ry. Co.,* 419 F. 2d 933, 936, (8th Cir. 1969)."

The union also argues that the addition of the sentence in subsection (q) that: "The judgment of the Court shall be subject to review as provided in sections 1291 and 1254 of Title 28", was for the purpose of showing that Congress *intended* that remand orders also be subject to appellate review. The union's argument is without merit.

Initially, if the addition of the sentence was designed specifically to establish that remand orders are subject to appeal, surely there would be some statement in the legislative history of the amendments to show such Congressional purpose. The legislative history of the amendments does not even mention the subject of appellate review, let alone the subject of whether remand orders are within Section 1291. The court below came to the same conclusion, stating (Petition, A-5):

> "Neither a reading of Section (q) nor a study of the legislative history shows any indication that its drafters intended that remand orders be subject to appellate review. In the absence of legislative intent, we must rely on the plain meaning of the last sentence of Section (q). . . . We determine it was the intent of Congress to provide for review of district court orders only in the event that these orders are final, and the district court's remand order was not final."

Moreover, in light of the complete absence of any legislative history, if Congress did in fact intend to make remand orders subject to appeal, it selected the least likely way of making its intent manifest. If the union's argument is correct, the last sentence of subsection (q) should have provided that "all" decisions of district courts shall be subject to review "notwithstanding" the provisions of Section 1291. As the sentence now is constructed, the logical conclusion is that, if Congress intended anything by the reference to Section 1291, it intended to make it clear that there was no design to broaden appellate jurisdiction beyond the power conferred under Section 1291. The numerous cases cited by the court below and the *Frisco* decision show that appellate courts do not have jurisdiction to review decisions remanding cases for purposes of arbitration under that Section.

The union asserts that the court below "ignored the practical effect test" of this Court for determining the finality of district court judgments. The answer to this contention is that the court below found it unnecessary to apply general principles to the subject matter when it found numerous decisions, including those of this Court, dealing with the specific subject and analogous subjects, which provided the proper approach.

The union's final argument on this point is that if remand orders are beyond review, district courts might utilize the power of remand to deprive a party of an award with which the court disagrees on the merits. Disagreement with the merits of an award, however, is not one of the statutory grounds empowering courts to remand or set aside decisions of the NRAB. Apparently, the union is arguing that a district court, disagreeing with the merits of an NRAB decision, may fabricate a jurisdictional defect in order to remand the dispute for a recon-

sideration of the merits, and that to prevent such abuse the Act must be construed as allowing appeals from district court remand orders. The railroad believes that this contention does not require comment.

3. The third point of the union (Petition, at 24-28) attacks the holdings relied upon by the court below. In substance, the union dismisses them all by stating that some cases arose under the Labor-Management Relations Act, others under the United States Arbitration Act, while others arose under the Social Security Act. The union's assertions concerning the origin of these cases are entirely correct—and irrelevant. These cases show that their rationale for holding that remand orders for the purpose of arbitration are not appealable was in no way the result of any requirement to such effect under the particular statute, but rather, resulted from a consideration of what constitutes a "final decision" under 28 U.S.C. Section 1291.

The common thread running through all those cases, the same thread connecting those cases to the one here and the *Frisco* case, is simply that a district court remand for purposes of arbitration is not subject to appellate review.

The cases relied upon by the court below all dealt with situations in which decisions of district courts remanding cases for arbitration were appealed to courts of appeals. In such cases, the rulings of the courts have been that where the relief sought of the district court in the action was to order arbitration, the ruling of the court that arbitration was required was an appealable order. On the other hand, when the issue before the court dealt with the merits of the dispute and the district court ruled that the merits first would be subject to an arbitration, the ruling

of the court that arbitration should proceed was *not* an appealable order.

The distinction between the two situations was described by this Court in *Goodall-Sanford, Inc.* v. *United Textile Workers of America,* 353 U.S. 550 (1957). In that case, the Court affirmed the decision of the lower courts ordering enforcement of an agreement to arbitrate. The Court stated (at 551):

> "There remains the question of whether an order directing arbitration is appealable. This case is not comparable to *Baltimore Contractors* v. *Bodinger,* 348 U.S. 176, which held that a stay pending arbitration was not a 'final decision' within the meaning 28 U.S.C. § 1291. Nor do we consider cases like *In Re Pahlberg,* 131 F. 2d 968, and *Schoenamsgruber* v. *Hamburg Line,* 294 U.S. 454, holding that an order directing arbitration under the United States Arbitration Act is not appealable. The right enforced here is one arising under § 301 (a) of the Labor Management Relations Act of 1947. *Arbitration is not merely a step in judicial enforcement of a claim nor auxiliary to a main proceeding, but the full relief sought.* A decree under § 301 (a) ordering enforcement of an arbitration provision in a collective bargaining agreement is, therefore, a 'final decision' within the meaning of 28 U.S.C. § 1291." (Emphasis added.)

Subsequent to the decision in *Goodall,* courts of appeals in various circuits have had occasion to comment on the impact the relief sought in the district court has upon the right to appeal. Thus, in *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283,* 269 F. 2d 618 (2d Cir. 1959), the court, after referring to the distinction made in the *Goodall* case, stated (269 F. 2d at 620):

> "However, the situation in that leading case is not the situation we have in the case before us. Here the

> district judge after looking at the contract decided that it was not his responsibility to decide in the first instance whether the plaintiff employer was entitled to the relief it claimed. . . . The stay pending arbitration which the court granted was not a denial of the full relief sought; the arbitration proceeding is, in effect, 'merely a form of trial, to be adopted in the action itself, in place of the trial at common law; it is like a reference to a master, or an "advisory trial" under Federal Rules of Civil Procedure. . . .' Murray Oil Products Co. v. Mitsui & Co., 2 Cir., 1944, 146 F. 2d 381, 383. Consequently, it is the type of arbitration which was by implication differentiated in Goodall-Sanford by the Court's statement that the arbitration requested there was 'not merely a step in judicial enforcement of a claim nor auxiliary to a main proceeding, but the full relief sought.'"

The distinction was discussed also by the Court of Appeals for the Ninth Circuit in *Alexander* v. *Pacific Maritime Association,* 332 F. 2d 266 (1964) wherein the court stated (at 267):

> "It is well settled that a stay of an action pending arbitration is not a final judgment appealable under 28 U.S.C. 1291. Ross v. Twentieth Century-Fox Film Corp. (9 Cir. 1956) 236 F. 2d 632, 633; Kirschner v. West Co. (3 Cir. 1962) 300 F. 2d 133, 134; Armstrong-Norwalk Rubber Corp. v. Local Union No. 283 (2 Cir. 1959) 269 F. 2d 618, 620-621.

Applying the rationale of these decisions, it is clear that the decision of the district court in this case remanding the dispute for further arbitration before the NRAB is not an appealable order. The relief sought was not an order to arbitrate; on the contrary, it was an action to enforce an arbitration award. The court did not dismiss the action as requested in the motion of the rail-

road. Instead, the court ruled that since it could not determine whether the union was entitled to the ultimate relief sought until the NRAB rendered an arbitration award that complied with the requirements of the Railway Labor Act, it was remanding the dispute for the purpose of having the NRAB do so. This is precisely the kind of order that the above cases held would not be appealable.

Finally, in the only other case in which the issue was raised in the same context as that of the instant case, the Court of Appeals for the Eighth Circuit held that a remand order of the district court referring the dispute back to the NRAB for further consideration is not appealable under 28 U.S.C. Section 1291.

Thus, in *Transportation-Communication Employees Union* v. *St. Louis-San Francisco Ry.*, 419 F. 2d 933, cert. den. 91 S. Ct. 34 (1970), the district court had found that the NRAB award was defective and remanded the dispute to the NRAB for further consideration. An appeal was taken to the Eighth Circuit from the order of remand. The appellate court dismissed the appeal stating (at 935-936):

> "We are convinced that when the law is applied to the facts of this case, the conclusion must follow that the judgments appealed from are not final decisions. The trial court has neither enforced nor denied enforcement of the Board's awards. It has made no final determination of the merits of the controversy and it has not dismissed the action.
>
> "As pointed out by TCU, the court did in its memorandum opinion determine some issues, such as a holding that the dispute was a minor dispute and that the Arbitration Board has jurisdiction to decide the controversy over the interpretation of the bargaining agreement between TCU and the railroad.

> Such rulings are interlocutory and remain subject to revisions at any time before final decision and are reviewable only upon an appeal from final judgment. Rule 54(b), Fed. R. Civ. P., *Stewart* v. *Bishop, supra,* p. 680 of 403 F. 2d; *Mesabi Iron Co.* v. *Reserve Mining Co.*, 8 Cir., 270 F. 2d, 567, 569.
>
> "TCU urges that the trial court by its remand to the Board has lost jurisdiction of the case and that review of any subsequent proceedings by the Board could be instituted in another court. Whether or not the subsequent proceedings could be instituted in another court in our view has no material bearing upon the crucial issue of whether the orders appealed from are final decisions. As heretofore pointed out, the orders appealed from do not meet the finality standards set forth in the cases previously discussed."

4. The union's final point (Petition, at 28-29) concerns the importance of the issues raised by its petition. The statistics it cites, however, do not support the union's conclusion. The union refers to statistics showing that in the three-year period following the 1966 amendments to the Railway Labor Act approximately 7000 awards and orders issued under Section 3 of the Act. Assuming the same proportions continued for the next two years, the total number of decisions now approximates 10,000. During the same period only two cases have reached the courts of appeals on the issue sought to be raised here and in both cases the courts construed the Act in the same way. It is obvious that the questions presented here do not approach the magnitude or the importance attached to them by the union.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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